INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Argument	10
Conclusion	21

CITATIONS

Cases:

Allen v. *United States*, 164 U. S. 492	20
Beavers v. *United States*, 3 F. (2d) 860	14
Blakeslee v. *United States*, 32 F. (2d) 15	16
Boehm v. *United States*, 123 F. (2d) 791, certiorari denied, February 2, 1942, No. 810, October Term, 1941	20
Brink v. *United States*, 60 F. (2d) 231, certiorari denied, 287 U. S. 667	16
Devoe v. *United States*, 103 F. (2d) 584, certiorari denied, 308 U. S. 571	13
DiCarlo v. *United States*, 6 F. (2d) 364, certiorari denied, 268 U. S. 706	14
DeWitt v. *United States*, 291 Fed. 995, certiorari denied, 263 U. S. 714	16
Dolff v. *United States*, 61 F. (2d) 881, certiorari denied, 289 U. S. 763	16
Dysart v. *United States*, 270 Fed. 77, certiorari denied, 256 U. S. 694	13
Hewitt v. *United States*, 110 F. (2d) 1, certiorari denied, 310 U. S. 641	19
McNutt v. *United States*, 267 Fed. 670	14
Moore v. *United States*, 150 U. S. 57	13
People v. *Crawford*, 25 N. Y. S. (2d) 259	14
Reynolds v. *United States*, 48 F. (2d) 762	14
Rutherford v. *United States*, 258 Fed. 855	14
Suhay v. *United States*, 95 F. (2d) 890, certiorari denied, 304 U. S. 580	13
United States v. *Allis*, 73 Fed. 165, affirmed, 155 U. S. 117	20, 21
United States v. *Commerford*, 64 F. (2d) 28, certiorari denied, 289 U. S. 759	20
United States v. *Falcone*, 311 U. S. 205	11, 12

444298—42——1

Cases—Continued.	Page
United States v. *Gallo*, 123 F. (2d) 229	4
United States v. *Manton*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664	19
United States v. *Radov*, 44 F. (2d) 155	16
United States v. *Rosso*, 58 F. (2d) 197	20
United States v. *Woods*, 66 F. (2d) 262	17
Valli v. *United States*, 94 F. (2d) 687	16
Wood v. *United States*, 84 F. (2d) 749, certiorari denied, 299 U. S. 589	16
Statutes:	
Criminal Code, sec. 37, 18 U. S. C. 88	3
New York Penal Law, sec. 974, Consol. Laws, c. 40	14
Miscellaneous:	
1 Wigmore, *Evidence* (3d ed., 1940), secs. 215, 216	13

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 849

JACOB NOVICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 543–547) is reported at 124 F. (2d) 107.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 17, 1941 (R. 547–548). The petition for a writ of certiorari was filed January 8, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there is sufficient evidence to support the jury's finding that petitioner was a party to the conspiracy charged in the indictment.

2. Whether, after petitioner had stated on direct examination that he "played numbers" and consented on cross-examination to the introduction of "numbers" sheets found on his person at the time he was arrested, the Government was entitled to show in rebuttal that the sheets indicated that petitioner was a "numbers" banker rather than a player.

3. Whether it was error for the trial court to commit for contempt, in the presence of the jury, a witness who had been called by the Government but refused to take the oath and testify.

4. Whether toll slips and a chart showing telephone calls between petitioner's restaurants and telephones registered in the names of other defendants were properly admitted in evidence.

5. Whether the evidence showed that the conspiracy terminated with the seizure of one of the stills involved on December 22, 1939, and thus rendered inadmissible declarations made by a co-conspirator after the seizure.

6. Whether the trial judge properly instructed the jury on the subject of reasonable doubt.

7. Whether the trial judge, in the exercise of his discretion, properly directed the jury to deliberate further after they had reported a disagreement as to petitioner.

STATUTE INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner and seventy-one others were charged in a one count indictment returned in the Southern District of New York on October 2, 1940, with conspiracy to defraud the United States of taxes on distilled spirits (R. 2–22). Twelve of the defendants, including petitioner, were convicted after trial (R. 44, 509–510) and four were acquitted (R. 44).[1] Petitioner was sentenced to twenty months imprisonment and to pay a fine of $5,000 (R. 60, 511). On appeal his conviction was

[1] Thirty-nine of the defendants pleaded guilty before trial (R. 26, 27, 29, 30, 31, 32, 33, 35, 36, 40, 41, 42) and seven changed their pleas and pleaded guilty at the trial (R. 42). Trial was severed as to seven others (R. 42, 43), the indictment was dismissed as to one (R. 43), and there was a directed verdict of acquittal as to another (R. 43). The record does not show the disposition as to the remaining defendant.

affirmed by the Circuit Court of Appeals (R. 547–548).[2]

The conspiracy centered around the operation of five stills, four of which, located in Yonkers, Bronx, and White Plains, New York, were seized by the Government (R. 63–65). The evidence in respect of petitioner's participation in the conspiracy may be summarized as follows:

Petitioner owned and operated two restaurants in Yonkers, the Kennedy House and the Prospect Bar and Grill (R. 120–121, 315, 363–364). Defendant Frank Galdo, who pleaded guilty (R. 41), operated a garage two blocks from the Prospect Bar and Grill (R. 413). In April 1939 petitioner told Galdo that he had a prospective tenant who wished to rent the basement of Galdo's garage to store sugar (R. 70–71). The next day petitioner returned with defendant Gallo and introduced the latter to Galdo as the tenant (R. 71–72, 77, 78). The southwest portion of the basement, which was farthest from the street, was selected for storage space, a $50 monthly rental was agreed upon, and petitioner gave Galdo $50 for the first month's rent (R. 72–74). Galdo was instructed to remove the cars from and lock the section where the sugar was to be stored (R. 75). A day or two later defendant Gallignano, who also pleaded guilty (R. 42), drove a truck containing copper coils and a

[2] Another defendant, Gallo, appealed separately and his conviction was also affirmed. *United States* v. *Gallo*, 123 F. (2d) 229 (C. C. A. 2).

copper column into the space which had been rented and left it there (R. 76–77, 79). At about the same time petitioner told Galdo that some sugar was coming in (R. 79–80) and immediately thereafter a truck of the Prospect Supply Company, a convicted defendant (R. 44), unloaded ten tons of sugar in the basement of the garage (R. 80–81). Gallignano returned later and removed a portion of the sugar and the copper column and coils (R. 81).

At this time a still was set up on property owned by one Kessman in Yonkers (R. 64).[3] During May and June 1939, while this still was in operation (R. 64), large quantities of sugar were regularly delivered to Galdo's garage by the Prospect Supply Company and were in turn hauled away by Gallignano and other defendants. The latter also brought in five-gallon cans of alcohol and these were stored in the garage. (R. 81–82, 85–86, 88–94, 96–101.)

During this same period petitioner arranged to buy fuel oil from Galdo at a price in excess of the market price (R. 82, 84, 94). The oil was hauled from Galdo's garage by Gallignano (R. 83).[4]

Galdo did not receive payment for the oil or any further payment of rent and early in June

[3] Petitioner admitted on cross-examination that he had known Kessman for twenty years and that he knew a still was operated on Kessman's property in the summer of 1939 (R. 394–395).

[4] The stills involved were operated with fuel oil (R. 65).

1939 he asked petitioner for $140 due him. Petitioner told him to see "the boys," meaning the Milo brothers.[5] Galdo accordingly talked to the Milos in the basement of the garage and it was arranged that he should be paid in alcohol at the rate of $10 per five-gallon can. (R. 94–96, 106–109.) Galdo later told petitioner that he was receiving alcohol in payment and petitioner replied that "if it was all right with them it was all right with him" (R. 107). Later in June, when Galdo asked petitioner for additional money due him, petitioner again referred him to the Milos, and he again received payment in alcohol (R. 109–110).

During June 1939 large quantities of sugar were also delivered by the Prospect Supply Company to a vacant garage in Yonkers (R. 65, 102–105).[6] Petitioner had made the arrangements to rent this garage from defendant Anthony Sylvestri,[7] the head of a contracting company, for $50 a month (R. 314–316). No money was paid to Sylvestri at the time and three or four weeks later he went

---

[5] Defendants Thomas and Louis Milo pleaded guilty during the trial (R. 42). They were patrons of petitioner's restaurants and petitioner had been well acquainted with Thomas Milo and had had numerous business and personal transactions with him over a period of many years (R. 367–368, 378–380, 405–407).

[6] The deliveries of sugar to this garage and Galdo's were under invoices made out to fictitious consignees for such items as tuna fish, walnuts, etc. (R. 66).

[7] Sylvestri pleaded guilty the day before the trial began (R. 41).

to the Kennedy House to collect from petitioner. Petitioner told Sylvestri that he had rented the garage for Thomas Milo, but said he would get in touch with Milo and obtain the money for Sylvestri. Petitioner also stated that Milo had used the garage for only three weeks for storing sugar and had then moved out; Milo, he said, had been running a still, but because "things were getting hot * * * they had to shut it down." (R. 316–317.)

In the latter part of June 1939 Galdo assisted some of the other defendants in dismantling and removing the still from the Kessman property (R. 110–118) and for this work he received $50 from petitioner (R. 122–123).[8]

In October 1939 petitioner told Galdo that "the same boys" wanted to move back into his garage (R. 125–126). Galdo demurred because he was afraid of "trouble," but upon petitioner's insistence he agreed to allow "them" to bring in "one load" (R. 126). Immediately thereafter a Prospect Supply Company truck delivered about ten tons of sugar at the garage (R. 127). A few days later, again at petitioner's request, Galdo received two more loads from the Prospect Supply Company. Petitioner and Louis Milo were present when one of these was delivered. (R. 130–132.) Gallignano, assisted by other defendants, again

[8] It appears that the defendants suspended operations for the summer because the still gave off a telltale odor and Kessman complained about it (R. 119).

hauled the sugar from the garage (R. 127–129, 132–133). Gallignano also purchased a quantity of fuel oil from Galdo (R. 129). On one of his calls at the garage Gallignano told Galdo that "they" were operating a still in the Bronx (R. 128, 129).

On one occasion in November 1939 Gallignano took Galdo's oil truck without the latter's consent and when he returned he explained that he had taken the truck to get some oil for the still (R. 134–135). Galdo then sold his truck because he wanted "to get out of this mess" (R. 135). A short time later petitioner told Galdo that he "should have given the fellows a little notice" before selling the truck; that some mash had been spoiled because they could not get oil to the still (R. 135–136).

On November 8, 1939, petitioner negotiated with the wholesale grocery firm of Shannon & Engle to purchase fifteen tons of sugar, the firm's entire current stock (R. 195–197, 203). On November 8 and 10 a truck driver, who introduced himself as "the fellow that Jake sent" (R. 197), hauled the sugar away, paying for it in cash (R. 198–203).

On November 15, 1939, the police seized a still in the Bronx and arrested defendants Petrosino and Lepore (R. 64).[9]

[9] Trial was severed as to Petrosino (R. 42) and Lepore was acquitted (R. 44, 498).

In the early part of November 1939, Sylvestri met Thomas Milo at petitioner's Prospect Bar and Grill and agreed to permit the erection of a still at 1 Lawton Street, Yonkers (R. 319–321), the office and main plant of Sylvestri's contracting firm (R. 314, 316). While they were discussing the matter, petitioner joined them and Milo told him that Sylvestri had consented to the erection of the still. Petitioner said, "That is all right." (R. 320–321.) During this same conversation, while petitioner was present, Milo told Sylvestri that if the still operated long enough Sylvestri would realize sufficient profit to discharge a $17,000 indebtedness (R. 321–322). In the latter part of November Sylvestri again met Milo and petitioner at petitioner's Kennedy House (R. 322). Milo told them that a lease would be drawn to cover the Sylvestri premises, that he would procure the necessary equipment for the still (R. 322–325), and that he wanted petitioner to "take care of the sugar end" (R. 325). Milo said that it would be necessary to have from 200 to 300 bags (ten to fifteen tons) of sugar a day. Petitioner replied, "I will see what I can do for you. I have two or three places I think that I can get sugar for you." (R. 325.)[10] At another meeting a few days later at the Prospect Bar and Grill Milo told petitioner, "I want you to get us a little protection for the place," to which petitioner re-

[10] Petitioner returned to Shannon & Engle in November to buy more sugar, but they refused to sell to him (R. 204).

plied, "I will see what I can do about giving us protection" (R. 327–328).

In November and December 1939 the Prospect Supply Company again made deliveries of large quantities of sugar to Galdo's garage and to another "drop" in Yonkers (R. 65). On December 22 a 3,000-gallon still was seized at Sylvestri's plant (R. 64, 328–329). That evening Sylvestri met Milo and asked him why the protection had been ineffectual. Milo said that petitioner had told him that afternoon "that something must have went wrong with the wires" (R. 329–330, have went wrong with the wires." (R. 329–330, 331.)

The last of the stills involved in the case was seized in April 1940 (R. 64). In the summer of that year, while the Government was investigating the operations of the conspirators (see R. 244–245, 247–248), petitioner told defendant Bernhardt,[11] a storekeeper and bootlegger (R. 234–235), that he had purchased sugar from the Prospect Supply Company (R. 279–280) and that the company was standing up well under the investigation and would not identify anyone (R. 247–248). Petitioner warned Bernhardt "not to identify anybody" (R. 248).

ARGUMENT

1. Petitioner says that he merely assisted others in obtaining sugar which was used in the manu-

[11] Bernhardt pleaded guilty before trial (R. 31).

facture of illicit alcohol, and asserts, somewhat inferentially, that there was no proof that he had knowledge of the conspiracy and that, therefore, under *United States* v. *Falcone,* 311 U. S. 205, he cannot be adjudged guilty as a conspirator (Pet. 3, 12–13). This contention is apparently advanced for the first time in the petition;[12] it is, in any event, wholly without merit.

Petitioner's relation with the other conspirators was not simply that of an innocent procurer of sugar. On the contrary, the evidence summarized in the Statement (*supra,* pp. 4–10) shows that he played an integral part in the perpetration of the entire scheme, occupying a key position as negotiator, not only with regard to sugar, but in other transactions as well. He arranged purchases of fuel oil, secured the premises used as "drops" for sugar, and paid the rent for one of these on at least one occasion. He participated in the negotiations preceding the establishment of the still at Sylvestri's plant, agreed to take care of the "sugar end," and undertook to obtain "protection" for the illicit enterprise. On one occasion he paid a coconspirator for dismantling and removing one of the stills. After the last of the stills had been seized and while the Government was conducting its investigation, petitioner warned one of the members of the illegal syndicate

[12] The *Falcone* case, which reached this Court from the court below, was not mentioned in its opinion in the instant case (see R. 544).

not to reveal information to the investigators. Throughout all these transactions petitioner displayed an intimate knowledge of the syndicate's plans and operations. Upon these facts it is manifest that the *Falcone* decision has no application and that the court below was correct in holding that the evidence "warranted submission of the case to the jury" (R. 544).

2. On direct examination, in explaining his relationship with defendant Thomas Milo, who, he said, was a "commission bettor," petitioner admitted that he played "numbers" (R. 367). On cross-examination, while he was being questioned about certain papers found in his possession when he was arrested, his counsel interrupted to suggest that he had no objection to the introduction in evidence of all such papers (R. 432). Among these papers were several sheets and slips which were subsequently admitted without objection as Exhibit 174 (R. 440–441, 517). Petitioner admitted that these latter papers referred to "numbers" play, but asserted that they showed bets made by him and not bets which he had taken (R. 440–441). In rebuttal the Government introduced testimony of a city detective, who was qualified as an expert on "numbers," that the papers indicated that the person who had them in his possession was a "number banker" (R. 459–460).

Petitioner argues (Pet. 3–4, 13–14) that the detective's testimony indicated that he was guilty of an unrelated felony and thus had the effect of

impeaching him on a collateral issue. This contention is untenable. As the court below pointed out (R. 545), the matter was opened by petitioner's testimony on direct examination. The detective's testimony was designed to show that petitioner's relationship with another defendant was of a different nature than petitioner asserted it to be and was therefore proper rebuttal. It was, moreover, admissible to explain the ambiguous figures appearing on the papers contained in Exhibit 174, which had been admitted with the consent of petitioner's counsel. Since the testimony was proper rebuttal, the fact that it might have incidentally implied the commission of an illegal act did not render it inadmissible. *Moore* v. *United States,* 150 U. S. 57, 61; *Devoe* v. *United States,* 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States,* 270 Fed. 77, 79–80 (C. C. A. 5), certiorari denied, 256 U. S. 694; 1 Wigmore, *Evidence* (3d ed., 1940), secs. 215, 216.[13]

Furthermore, the fact that numbers banking is a crime under New York law was not mentioned while the detective was being interrogated by the

[13] The cases cited by petitioner (Pet. 14) are inapposite. They involved situations where truly collateral matters were raised for the first time on cross-examination of a defendant and were pursued by the prosecution in rebuttal, and illustrate the rule stated by the court below (R. 545) and quoted in petitioner's brief (p. 13).

Government, and no charge was requested on the matter (see R. 545–546). The testimony could have had but slight, if any, effect upon the jury. Indeed, it added little to what petitioner had voluntarily admitted on direct examination, for playing numbers is itself a crime in New York. New York Penal Law, Sec. 974, Consol. Laws, c. 40; *People* v. *Crawford,* 25 N. Y. S. (2d) 259.

3. During the trial the Government called one Louis Harrison as a witness and he refused to testify because he did not want to be a "stool pigeon" (R. 191). The court, after admonishing Harrison several times and warning him of the consequences, committed him for contempt (R. 191–192). Petitioner argues (Pet. 4, 14–15) that this action of the court in the presence of the jury constituted prejudicial error.

Petitioner cites no authorities involving contempts which sustain his contention, but relies by analogy upon cases concerning perjurious testimony (Pet. 14). Though it has been held that in some circumstances it may be prejudicial error for a court, in the presence of the jury, to direct that a witness be held for testifying falsely,[14] the *ratio decidendi* of those decisions has no applica-

[14] *McNutt* v. *United States*, 267 Fed. 670 (C. C. A. 8); *Rutherford* v. *United States*, 258 Fed. 855 (C. C. A. 2). Compare, however, *Reynolds* v. *United States*, 48 F. (2d) 762, 763 (C. C. A. 10); *DiCarlo* v. *United States*, 6 F. (2d) 364, 367 (C. C. A. 2), certiorari denied, 268 U. S. 706; *Beavers* v. *United States*, 3 F. (2d) 860, 863 (C. C. A. 6).

tion here, for Harrison refused to testify at all. And, of course, a court has inherent power to summarily commit a contemnor for contumacious conduct in its presence.

Moreover, the trial court, at the request of petitioner's counsel, specifically instructed the jury that they should give no heed to the incident so far as the defendants were concerned, because the witness "said nothing against them" (R. 192–193). In the circumstances, it can scarcely be contended that the jury could have drawn any unfavorable inference against petitioner because of the incident, particularly since he was but one of sixteen defendants on trial.

4. Petitioner assails the reception in evidence of telephone company toll slips and a chart prepared by the Government showing that calls were made from petitioner's restaurants to telephones registered in the names of other defendants and from those telephones to the restaurants. He argues that this evidence in no way proved that the calls were made by or to him because the telephones in his restaurants were public pay stations. (Pet. 4–5, 15.) This contention must fall in view of the evidence that petitioner was closely associated with the other defendants and that the restaurants were meeting places of the conspirators, including petitioner. The jury was entitled to infer from this evidence that the calls in question were made by or to petitioner.

444298—42——2

The same objection as petitioner makes here was rejected in a similar factual situation in *DeWitt* v. *United States*, 291 Fed. 995, 1002 (C. C. A. 6), certiorari denied, 263 U. S. 714. The court there held, as did the court below (R. 547), that evidence of telephone calls of this character is admissible as showing the mode of communication between conspirators and the fact that they were in frequent communication with each other.[15]

5. A still was seized at Sylvestri's plant on December 22, 1939 (R. 64). Sylvestri testified that on the night of the twenty-second, after the seizure, Thomas Milo told him that he had seen petitioner that afternoon and that petitioner had said that "something went wrong" (R. 329–330, 331; see p. 10, *supra*). Petitioner apparently contends that the seizure of this still terminated the conspiracy and that for this reason Sylvestri's testimony as to Milo's statement to him was inadmissible (Pet. 5, 16).

The evidence showed, however, that the last of the stills involved in the conspiracy was seized on April 3, 1940 (R. 64). And petitioner stipulated for the purposes of the bill of exceptions

[15] See also *Valli* v. *United States*, 94 F. (2d) 687, 693 (C. C. A. 1); *Wood* v. *United States*, 84 F. (2d) 749, 751 (C. C. A. 5), certiorari denied, 299 U. S. 589; *Dolff* v. *United States*, 61 F. (2d) 881, 885 (C. C. A. 7), certiorari denied, 289 U. S. 763; *Brink* v. *United States*, 60 F. (2d) 231, 234 (C. C. A. 6), certiorari denied, 287 U. S. 667; *United States* v. *Rador*, 44 F. (2d) 155, 157 (C. C. A. 3); *Blakeslee* v. *United States*, 32 F. (2d) 15, 18 (C. C. A. 1).

that "The testimony indicated that the operation of these stills and the subsequent sale and resale of the alcohol to the eventual consumers was all done and performed in the execution of a single conspiracy" (R. 64–65).

Furthermore, the indictment charged that as a part of the conspiracy the defendants concealed their transactions to prevent the disclosure of the existence of the conspiracy (R. 14). It was proved that in the spring of 1940 petitioner warned defendant Bernhardt that if he identified anyone in connection with the case he would be "cut up into ribbons" (R. 256–257; see also R. 248). It is apparent, too, that at this time petitioner was working in conjunction with the defendant Samuel Feldman, of the Prospect Supply Company, to conceal the deliveries of sugar to the various "drops" (R. 244–251).

Consequently, the remarks of Milo to Sylvestri on the evening of December 22, 1939, were admissible as statements of a co-conspirator regarding the conspiracy during its course. *United States* v. *Woods,* 66 F. (2d) 262, 265 (C. C. A. 2).

Finally, as the Circuit Court of Appeals pointed out (R. 547), the very evidence which petitioner sought to exclude showed that he was still identified with the conspiracy.[16]

6. Petitioner complains (Pet. 6, 16–17) of the examples which the trial judge used in explaining

[16] Milo's statement to Sylvestri concerned the "protection" which petitioner had promised for the still (see pp. 9–10, *supra*).

to the jury what constitutes reasonable doubt. These examples, quoted in petitioner's brief (p. 6), were given when the jury returned after some deliberation of petitioner's case and requested the judge to "explain again what constitutes reasonable doubt" (R. 506–507). A reading of the full context shows, however, that the judge's exposition of this concept was correct (R. 480–482, 487, 506–509). He explicitly instructed the jury, both in the main and in the supplemental charge, that if they did not "have a moral certainty of the defendant's guilt," he could not be found guilty (R. 481, 506). As the court below said (R. 546), the illustrations, though perhaps inappropriate, were used to impress upon the jury the kind of strong conviction they must have before they could find against the accused. Viewed in their context it cannot be said that these examples misled the jury.

The fairness of the main charge, which included one of the examples given in the supplemental charge (R. 481–482), was in effect conceded by petitioner's counsel when he failed to object (see R. 489). He requested one amplification and one modification, neither of which related to reasonable doubt, and these were granted (R. 489–490, 493–494). Nor did he object when the supplemental charge was given (see R. 509). The alleged error, therefore, may not be raised on appeal since it was not called to the attention of the trial court when a timely correction could have

been made. *United States* v. *Manton,* 107 F. (2d) 834, 847 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Hewitt* v. *United States,* 110 F. (2d) 1, 9 (C. C. A. 8), certiorari denied, 310 U. S. 641.

7. The jury retired at 2:00 p. m. on May 26, 1941 (R. 44, 495), and about four hours later returned verdicts as to fourteen of the defendants (R. 496–498). A half hour later a verdict was returned as to another (R. 502, 503). It was then 7:00 p. m. and the jury went out for dinner, after which they continued their deliberations. At 9:15 p. m. the jury reported a disagreement as to petitioner. (R. 504.) The trial judge said he felt constrained to ask the jury to consider the case further. He pointed out that the trial was long and costly both to the Government and petitioner. He said that disagreements accomplish nothing because "it has all got to be done over again." He stated that while justice both to the Government and petitioner required that they endeavor to reach a verdict one way or the other, none of the jurors should "abdicate his judgment to anyone else." (R. 504.)

After the jury had retired for further deliberation the court instructed the clerk that if they had not agreed upon a verdict by 11:00 p. m. he should take them to a hotel for the night (R. 505). The jury not having reached a verdict, court adjourned at 11 o'clock until 10:30 a. m. the following day and the jury was taken to a hotel (R. 505). At 2:35 p. m. the next day, after having returned

once to hear certain testimony read (R. 505–506) and again for a re-explanation of what constitutes reasonable doubt (R. 506–509; see pp. 17–19, *supra*), the jury returned its verdict of guilty (R. 509–510).

Petitioner argues (Pet. 7, 17) that the court should have discharged the jury when they reported a disagreement. This, however, was within the discretion of the court. In view of the number of defendants involved, the length of the trial, the volume of evidence presented, and the order in which the verdicts were returned, it seems clear that the jury had not devoted an inordinate amount of time to consideration of petitioner's case alone at the time they reported a disagreement. There was, therefore, no abuse of discretion in sending the jury back for further deliberation. *United States* v. *Rosso,* 58 F. (2d) 197, 201 (C. C. A. 2). Nor, in the light of the court's admonition that none of the jurors should forsake his own conscientious convictions, was there any impropriety, as petitioner contends, in the court's remarks concerning the desirability of reaching a verdict. Indeed, it was the duty of the court to so instruct the jury. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. (2d) 791, 812 (C. C. A. 8), certiorari denied, February 2, 1942, No. 810, October Term, 1941; *United States* v. *Commerford,* 64 F. (2d) 28, 31 (C. C. A. 2), certiorari denied, 289 U. S. 759; *United States*

v. *Rosso, supra; United States* v. *Allis,* 73 Fed. 165, 182 (C. C. E. D. Kan.), affirmed, 155 U. S. 117.

CONCLUSION

The case was correctly decided below, there is no real conflict of decisions, and no question of general importance is involved. We, therefore, respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
KEITH BROWN,
W. MARVIN SMITH,
Attorneys.

FEBRUARY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942